New York State Department of Environmental Conservation
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John P. Cahill
Commissioner

August 28, 2000

Ann E. Goode, Director
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attn: Title VI Guidance Comments

Dear Ms. Goode:

This letter responds to the EPA's request for comment on the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Programs* (Draft Recipient Guidance) and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Draft Revised Investigation Guidance). In general, both guidance documents provide a basic framework for addressing potentially discriminatory practices within the context of environmental permitting. EPA staff clearly devoted time and resources on the guidance development and should be commended for the attention to comments and concerns raised during guidance development. However, the draft documents still fail to provide sufficient detail to identify, analyze and address potentially significant adverse disparate impacts on protected classes. Furthermore, the documents fail to include key concepts and criteria critical to ensure due process and fair, transparent procedure. The New York State Department of Environmental Conservation (DEC) encourages EPA to again consider the public comments received and revise the documents accordingly.

On May 6, 1998, the DEC submitted comments on the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits*. The DEC recommends that EPA again consider the comments raised therein and submits the following for additional consideration.

The draft guidance fails to lay out a clear process that if followed will satisfy Title VI concerns. The guidance gives EPA very broad discretion with respect to how it will conduct an investigation and make its findings. At a minimum, EPA must define key terms and include an appendix with a detailed discussion of the methodologies it will utilize to conduct investigations and make determinations with respect to, among other things, adverse impacts, discriminatory impacts, significant impacts and Title VI compliance.

The Draft Revised Investigation Guidance should require that a complainant seek remedy in the recipient's administrative process prior to filing a complaint with EPA. The guidance does encourage the complainant to pursue remedy through administrative appeal. However, participation in the administrative review process should be a prerequisite for filing a complaint under Title VI, particularly when a recipient has adopted a policy to implement Title VI compliance. Such a

prerequisite would: 1) provide incentive for recipients to adopt Title VI policies; 2) provide recipients with the opportunity to identify and address environmental justice concerns in the course of project review, when there is more flexibility to address Title VI concerns; 3) provide applicants with certainty in the permit outcome; and 4) encourage applicants to be more responsive to Title VI concerns in the permit process. Requiring that complainants seek remedy in the recipient's administrative process also benefits potentially impacted communities, since Title VI concerns would be identified and addressed within the administrative process, when project modifications are possible, rather than forcing communities to await remedy in the form of assistance withdrawal to the recipient. In connection with this requirement, EPA should devote significant resources to assist recipients in developing and adopting public participation processes which include all stakeholders in the administrative process.

The guidance remains unclear with respect to its affect on state-funded programs which receive no federal funding. Purely state-funded and state run programs should not be subject to the guidance and Title VI challenge. The guidance should clearly state that its applicability and legal authority is limited to Federally delegated state permit programs.

The guidance must clarify the circumstances which warrant permit denial or revocation, if any. Due process dictates that project sponsors possess certainty with respect to process outcome, particularly where a permit has been processed in accordance with all applicable federal and state standards. While the guidance intends to seek resolution through the recipient program, guidance language leaves open the possibility that a permit could be denied as a result of the investigative process. (See IV.B. , "Denial of the permit at issue will not *necessarily* be an appropriate solution." emphasis added). Absent the required clarity, the guidance may subject the state to legal challenges by a project sponsor, should the State be compelled to revoke or deny a permit based on discriminatory effect.

Permit renewals and minor modifications should be exempt from Title VI investigation. New York State's Uniform Procedures regulations require that all renewals and modifications for permits issued under federally delegated permit programs be treated as new applications, with some federally approved or federally cited exceptions for certain modifications. By treating federally delegated permits as new applications, New York State has established a procedure of review for permit actions which potentially relate to Title VI "stressors" and warrant potential scrutiny under Title VI. All other permit renewals and modifications, which do not relate to Title VI stressors, should be exempt from challenge. Applying the guidance to all state programs would have a significant effect on state resources given that on average over 2000 requests for permit renewals are submitted each year.

A list of the minor modifications that will not trigger an investigation should be included in the guidance. While the guidance indicates that OCR will not generally initiate an investigation where the permit that triggered the complaint is a modification, such as a facility name change or a change in mailing address, such an investigation is not precluded. The guidance should clearly state that minor modifications will not form the basis for a complaint and include a list of relevant modifications.

The guidance fails to articulate necessary technical and legal standards for filing a Title VI complaint. The guidance should require explicit documentation of the alleged discriminatory act. Without specific documentary evidence, a recipient, once notified of a complaint filing, will lack the information necessary to respond to the complaint. Moreover, a recipient should have an opportunity to request a more definite statement of the alleged discriminatory act. As previously stated, the guidance should require that the complainant exhaust its administrative relief in the recipient's permit and permit appeals process. The guidance should also require that the complainant document its role in that process and include a statement of Title VI issues raised in that process.

Pursuant to the guidance, a timely complaint is one which is filed within 180 days of the alleged discriminatory act. Therefore, complaints alleging discriminatory effect resulting from the issuance of a permit are timely if filed within 180 days after issuance of the permit. This time frame is too long and creates problems for all stakeholders. The problems are further exacerbated by potential extensions of the 180 day time frame for "good cause." At a minimum, EPA must define "good cause" and establish criteria for waiver of the 180 day clock.

The time frame within which a recipient must submit a response or answer to the complaint is inadequate and must be extended. The policy states that a recipient will have 30 days to respond to a Title VI complaint after being served. This time frame is insufficient to assemble necessary information such as facts, demographic data, and health data, and prepare a response incorporating those facts and relevant points of law. Similarly, the time frame set forth for recipient compliance is inadequate and must be extended.

Adverse Impacts should be defined relative to existing federal and state standards where those standards exist, particularly since environmental standards tend to be health based. Recipients may attempt to incorporate strict pollution reduction standards into the permit process and applicants may voluntarily agree to stricter standards. However, absent firm legal authority, a recipient cannot require permit applicants to adhere to a stricter standard, nor can a recipient impose wide reaching pollution reduction standards on existing sources to attain a standard that has not been promulgated.

The guidance still fails to address the role of local government and zoning laws in the siting of facilities and fails to recognize its relationship to the permitting process. We believe local zoning needs to be specifically addressed in the context of this guidance.

The DEC recognizes the inherent difficulties of developing specific criteria and methodologies for investigating the wide range of potential Title VI complaints. While the current guidelines begin to define such criteria and methodologies, further detail is necessary in order to achieve a workable document. EPA must further develop criteria related to identifying and comparing potentially impacted communities and reference communities and conducting disparity analyses.

While the comments herein focus on the Draft Revised Investigation Guidance, the DEC encourages EPA to further develop the Draft Recipient Guidance. By providing recipients with a variety of *detailed* Title VI activities, recipients may easily adopt such activities into their programs and avoid potentially discriminatory practices and administrative complaints challenging permits.

New York State remains committed to address environmental justice issues and to remedy potentially discriminatory effects. These are DEC's preliminary comments and DEC requests that the comment period remain open an additional 30 days. DEC reserves the right to provide additional comment to EPA.

Environmental Justice is an extremely important issue for Commissioner Cahill and DEC staff. We look forward to discussing this topic further with you and assisting EPA in its efforts to finalize a workable approach for this issue.

Sincerely,
/s/

Monica L. Abreu Conley
Environmental Justice Coordinator

Attachment

cc: J. Fox - Regional Administrator, USEPA Region II
M. Hayden - Environmental Justice Coordinator, USEPA Region II

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John P. Cahill
Commissioner

May 6, 1998

Ann E. Goode
Director, Office of Civil Rights
USEPA - Attention: Title VI Guidance
Office of Civil Rights
Mail Code 1201
Washington, D.C. 20460

Re: Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits

Dear Ms. Goode:

This letter responds to the EPA's request for comments on its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits.* While the Department of Environmental Conservation (DEC) supports efforts to ensure environmental programs are carried out in a non-discriminatory manner, EPA's proposed guidance fails to establish a workable vehicle to achieve this worthy and critical objective. The guidance conflicts with New York State's current permit program and would significantly disrupt the State program. For the reasons enumerated below, we urge EPA to withdraw its interim guidance.

The first major concern involves the timeliness of a complaint and its effect on the State permitting scheme. Pursuant to the guidance, a timely complaint is one which is filed within 180 days of the alleged discriminatory act. Therefore, complaints alleging discriminatory effect resulting from the issuance of a permit are timely if filed within 180 days after issuance of the permit. This creates several problems. Since a complainant need not exhaust its administrative remedies, it is possible that the State could first learn of the discriminatory effect claim *after* the permit has been issued and significant project construction has begun. Discriminatory effect claims can and should be properly raised and addressed in the context of New York State's existing administrative permit process, which provides for public notice and comment *prior* to permit issuance. The guidance allows a complainant to bypass the most appropriate forum available for resolving these issues efficiently and effectively. The guidance should require that a complainant first raise the environmental justice claim during the State public comment period to facilitate informal resolution of the complaint.

Permitted activity may be delayed unnecessarily by a complainant who files a complaint well after a permit has been issued. Since the guidance provides for waiver of the 180 day filing limitation, a project which benefits the environment and the affected community may be delayed indefinitely. For example, continued reliance on an aging solid waste facility could result if a permit for a state-of-the-art facility is delayed.

Additionally, complaints initiated after the permit is issued render ineffectual the due process afforded project sponsors and the public during the State permit process. The guidance may subject the state to legal challenges by a project sponsor, should the State be compelled to revoke or deny a permit based on discriminatory effect.

The second major issue concerns notice to the state that a claim has been filed. The complaint process outlined in the guidance fails to provide the state and the project sponsor timely notice of the complaint. Pursuant to the guidance, EPA's Office of Civil Rights ("OCR") will notify the state of the existence of a complaint only after it has determined that the complaint states a valid claim. The state should be made aware of the complaint immediately. Early notification will enable the state to submit comment regarding the claim before OCR makes an initial finding of disparate impact. Such comment would likely assist EPA in evaluating whether the complaint states a valid claim. Furthermore, early notification will facilitate informal resolution with affected stakeholders and, if appropriate and timely, the issues of the claim may be considered in the formal permit review process.

Third, the guidance's objective to determine whether permits "will create a disparate impact, or add to an existing disparate impact on a racial or ethnic population" is not served by subjecting renewals and minor modifications to Title VI review. By definition, minor modifications and renewals will not have a significant adverse environmental impact. Therefore such permits have little or no likelihood of creating a disparate impact or adding to an existing disparate impact. The DEC urges EPA to remove minor permit modifications and renewals from the interim guidance. The guidance states that permit modifications such as facility name change or otherwise beneficial modifications that are neutral in terms of their impact on human health or the environment are likely to be dismissed. This suggests that such claims would be accepted, if properly pleaded, and reviewed by OCR. To allow public comment and challenge on permit renewals would severely tax the limited financial and staff resources of New York State. In 1997, the Department received 2,032 requests for permit renewals.

Next, the requirements for a properly pleaded complaint are not adequate. In addition to the requirements set out in the guidance, the complainant should provide a verified complaint supported by affidavits and statistical evidence documenting disparate impact. The claimant should also demonstrate a good faith basis for the claim. This is particularly important given that a claim filed with OCR may significantly affect the operations of a permitted facility. Since the affect of the claim is considerable, the claimant should provide ample proof substantiating its claim.

The State is also concerned that the scope of the guidance with respect to its affect on State funded programs which receive no federal funding. The guidance should specify EPA's legal authority to issue guidance applicable to wholly state-funded programs. Purely state-funded and state run program should not be subject to the guidance and Title VI challenge. The guidance creates an avenue of legal challenge pursuant to Title VI which may not have previously existed and exposes the State to increased litigation. Moreover, the revocation of federal funds for state-funded and federal-funded programs diminishes the State's overall ability to preserve the environment for the people of the State. Given the significant affects of this guidance on all state programs, comments provided by the states should be given considerable weight.

In general, the guidance lacks necessary detail, fails to define key terms and fails to provide a method of analysis for disparate impact. Without explicit guidance, the State lacks the tools to identify and evaluate disparate impact in order to avoid Title VI challenges. More importantly, the policy completely

lacks any standards which DEC can use to ensure it is in compliance with the policy. EPA should not issue this policy unless and until it defines specific criteria and methodologies that are acceptable for identifying disparate impacts and affords states and the public a comment period on the criteria and methodology. This is an essential prerequisite of a workable policy that is totally lacking in EPA's interim guidance. Impacted communities need such criteria to evaluate whether they are subject to disparate impacts. States need the criteria to avoid or mitigate impacts in minority or disadvantaged communities. EPA needs criteria to carry out its responsibilities to evaluate the legitimacy of complaints. Such standards would allow and encourage states to incorporate disparate impact analysis into current permit review process, thereby avoiding complaints filed under Title VI. Furthermore, the guidance should define the elements of an appropriate supplemental mitigation project, and describe the legitimate interests that justify the decision to proceed with the permit notwithstanding the disparate impact.

Finally, the guidance fails to address the role of local zoning laws in the siting of facilities and recognize its relationship to the permit process. This is a critical issue. Project sponsors select a site based on a host of factors, including local zoning which is pivotal. Once a site has been selected, the project sponsor then applies for environmental permits. The DEC's ability to require a project sponsor to look at alternative sites is limited to situations where an Environmental Impact Statement has been required. Addressing discriminatory effect issues after a siting decision has been made and the permit has been issued, rather than prior to siting, is sure to create delay and confusion. The DEC's ability to require the consideration of alternative sites is totally foreclosed for minor permit modifications and renewals involving existing facilities.

New York State remains committed to address environmental justice issues and to remedy potentially discriminatory effects. These matters are best addressed within the State's current regulatory framework. Therefore, we request EPA to withdraw the interim guidance
and give New York State the opportunity to voluntarily comply with Title VI within its own permitting framework.

These are DEC's preliminary comments and DEC requests that the comment period remain open an additional 30 days. DEC reserves the right to provide additional comment to EPA.

Environmental Justice is an extremely important issue for Commissioner Cahill and DEC staff. We look forward to discussing this topic further with you and assisting EPA in its efforts to finalize a workable approach for this issue.

Sincerely,
/s/

Frank V. Bifera
General Counsel

cc: C. Browner - Administrator, USEPA
J. Fox - Regional Administrator, USEPA Region II
M. Hayden - Environmental Justice Coordinator, USEPA Region II